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No. 20,429

IN THE

United States Court of Appeals
For the Ninth Circuit

HUDSON WATERWAYS CORPORATION,	}
vs.	
WILLIAM J. SCHNEIDER,	
	<i>Appellant,</i>
	<i>Appellee.</i>

APPELLANT'S REPLY BRIEF

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THE FACTS

Although the statement of facts in Appellee's Brief shows a general agreement with the facts stated in our Opening Brief, certain statements of the Appellee require correction or clarification.

Appellee states (Brief pp. 17, 19) that the trial court found that the condition of the switch box was of long standing. Actually there was no such finding by the trial court and no evidence upon which such a finding could have been based.

Appellee lays considerably more stress upon a statement, repeated three times (Brief pp. 5, 21, 28), that it was not his duty to check the wiring inside the switch box prior to the time when he was assigned to find the

trouble and repair it, but the duty of the First Assistant Engineer. It is not Hudson Waterways' position at all that Schneider had a duty to check the *interior* wiring prior to the time when trouble was reported. To say, however, that it was the duty of the First Assistant Engineer to do so is to exercise great liberality with the testimony upon which Appellee relies in his own deposition (Exh. J, p. 25) where the question and answer were simply:

“Q. Who would have that duty to check the electrical equipment?

A. Oh, I'd say the first engineer, probably years ago.”¹

Finally, it is disingenuous of Appellee, after acknowledging that he, as an officer, had been sent to see what was wrong with the compressor and get it going, to suggest (Brief, p. 7) that he might have supposed that the reason the compressor was not running was simply that someone had turned off the power.

¹The statement (Appellee's Brief p. 28) that this testimony was placed in evidence by Hudson Waterways likewise overreaches. Exhibit J, Schneider's deposition, was introduced (Tr. 278) by Hudson Waterways' counsel for the purpose of reading certain testimony (Tr. 278-281) not including the portion relied on here by Appellee, whose counsel then introduced the remainder by asking that the entire deposition be deemed read (Tr. 281).

ARGUMENT

I

THE WARRANTY OF SEAWORTHINESS DOES NOT APPLY IN
THE CIRCUMSTANCES OF THIS CASE**A. The Contention That Reasonableness Is Not Involved in the
Warranty of Seaworthiness Is Plainly Error.**

Appellee urges that the warranty of seaworthiness is not subject to standards of reasonableness and argues this on the basis of the well-known statement that the duty is "absolute." But the term "absolute," as used in the context of *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 A.M.C. 1503 and other leading cases clearly means only to indicate that the duty is not subject to care or the lack of it on the part of the shipowner. The *Mitchell* case itself, however, makes it clear by repetition that reasonableness is a key ingredient of the warranty:

"What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." 362 U.S. at 550, 1960 A.M.C. at 1512.

**B. The Supposed Distinction Between Seamen and Harbor
Workers in the Application of the Warranty of Seaworthi-
ness Is Unfounded.**

In contending that the shipowner warrants the non-existence of a defective condition which a qualified man is engaged and directed to find and repair, Appellee seeks

to distinguish the authorities relied upon by Appellant on the ground that the cases involved harbor workers and to set up a distinction of treatment between the harbor workers and seamen in this regard. But the fundamental authority by which the seaman's warranty is extended to harbor workers clearly makes such a distinction untenable. The harbor worker acquired the warranty of seaworthiness under the doctrine laid down in *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698. The Supreme Court in that case stressed the complete parallelism between seamen and longshoremen in connection with the warranty of seaworthiness in such language as this:

“[W]hen a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights.” 328 U.S. at 97, 1946 A.M.C. at 706.

Again, when the Supreme Court looked back at the *Sieracki* case in *Pope & Talbot v. Hawn*, 346 U.S. 406, 413, 1954 A.M.C. 1, 9, its view was the same and, in speaking of seamen and harbor workers, the court reaffirmed that “All were entitled to like treatment under law.”

The sole authority upon which Appellee relies for a distinction between seamen and harbor workers is a District Court case in which the rule involved here was plainly not applicable to the facts.² Strong evidence that

²In *Dixon v. United States*, 120 F.Supp. 747, 1954 A.M.C. 966 (S.D.N.Y.), on which Appellee relies, there is scarcely even a superficial resemblance to the present case or to the cases relied

no such distinction is observed by the Supreme Court is to be found in the cases where the warranty is denied because the vessel is out of navigation. The refusal to apply the warranty to the vessel in such cases is a general extension to the whole vessel of the more limited rule upon which Appellant relies here. In *Roper v. United States*, 368 U.S. 20, 1961 A.M.C. 2499, a longshoreman's suit in which recovery was denied because the vessel was found to be out of navigation, the court drew the parallel with cases like *West v. United States*, 361 U.S. 118, 1960 A.M.C. 15 (1959) and, in denying the warranty of seaworthiness to the longshoreman, relied directly upon its own earlier holding in a seaman's case, *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 1952 A.M.C. 12.

C. Assumption of Risk Is Not Involved Here.

We agree wholeheartedly that the doctrine of Assumption of Risk, to the extent that it describes anything not comprised in contributory negligence, is not a defense in seamen's and longshoremen's cases. The attempt, however, to equate the rule relied on by Appellant with the doctrine of assumption of risk is utterly misconceived. It is evidently based again upon the single District Court case of *Dixon v. United States*, 120 F.Supp. 747, 1954 A.M.C. 966 (S.D.N.Y.), which was not analogous on its facts to the present case and in which the defense of as-

on by Appellant. In *Dixon* it was represented to the mate that three rungs at the bottom of a ladder had been repaired and he was asked to check the repairs. As he went down the ladder for the purpose of checking the rungs at the bottom, different rungs higher up gave way and he fell. Thus the appliance was represented to him as repaired and he was evidently sent to check the quality of the repairs and was injured by entirely different defects than he was told had originally existed.

sumption of risk was urged and discussed together, and in confusion, with a contention that the warranty of seaworthiness did not apply.

The essential element of an assumption of risk is the injured man's exercise of a choice to proceed under a known risk.³ This element is not involved in the contention that the warranty of seaworthiness does not apply, even though the facts here do involve similar conduct in Schneider's turning on the power before experimenting with the broken box. The rule relied on by Appellant has nothing to do with the assumption of risk as a defense, or with any other defense, but rather with the existence of the basic right, a right as to which Appellee's analysis only begs the question. The rule does not concern an injured man's knowledge of a breach of duty to him and his implied willingness to bear the consequences, but rather the existence of a duty in the first place based upon whether the equipment involved is held out to be free from defect.

D. Appellee's Authorities Are Not Applicable.

We have already pointed out (footnote 2, *supra*) that the case of *Dixon v. United States*, *supra*, turns upon very different facts than the present case. *Sprague v. Texas Company*, 250 F.2d 123, 1958 A.M.C. 67 (2d Cir. 1957) and *Van Carpals v. the SS American Harvester*, 297 F.2d 9, 1962 A.M.C. 395 (2d Cir. 1961), the other two cases which Appellee cites as presenting somewhat parallel fact situations, are likewise readily distinguishable. Neither of those cases involved the repair of the defect

³See, *e.g.*, 38 Am. Jur. Neg. Sec. 171, 173.

or condition which rendered the vessel unseaworthy. Instead, each of them involved the existence of steam pressure in a line when the pressure should have been completely relieved to permit the opening of the line or equipment attached to it. In the *Sprague* case some work was to be done which required opening a tank which, when it was opened, gave out hot water and steam; the defective condition consisted of the existence of pressure where it should not have been and the failure of the pressure gauge to show it. In the *Van Carpals* case no repairs were to be made at all but a valve was to be opened to permit Coast Guard inspection of its interior, and again the line pressure had not been relieved. In each case the improper condition could and should have been alleviated before the work was done. The only analogy of those cases to the present case lies in the fact that here the electric power was on, as the steam pressure was in those cases. But here, in contradistinction to those cases, it was the injured man himself who was responsible for that condition.

II

THE FINDING OF NEGLIGENCE IS UNSUPPORTED

A. The Evidence Was Inadequate to Hold Appellant for Negligence.

We have fully discussed in our Opening Brief the inadequacy of the evidence to supply the finding of negligence. Appellee counters with certain materials relating to causation, which is not in question here, and with the statement that the District Court could and did find that

the condition had existed for some time so as to have been discovered on reasonable inspection by the shipowner. This statement is entirely unfounded as there is no such finding by the trial court and, as we pointed out in our Opening Brief, there was no evidence upon which such a finding could have been made. Appellee further responds to this point by citing and quoting from certain cases in which the records were reviewed and found sufficient to support the judgments. But here we are dealing with a specific record and it seems difficult for Appellee to draw any comfort from cases on unrelated fact situations in which the courts were reviewing records not available here. To the extent that those cases imply that other courts would indulge in speculation or follow a lower standard than this court has applied, *e.g.*, in *The Belgrano*, 299 F.2d 897, 1962 A.M.C. 1327 (9th Cir.), they would scarcely seem controlling in the present case.

B. The Doctrine of Res Ipsa Loquitur Does Not Apply.

Irrespective of the nature of the particular act, omission or circumstance from which the injury resulted, the courts have almost uniformly allowed or denied the recovery of damages depending upon whether or not the facts of the case disclosed the essential elements necessary for the application of the *res ipsa loquitur* doctrine. *Furness, Withy & Co., Ltd. v. Carter*, 281 F.2d 264, 1960 A.M.C. 1784 (9th Cir.), the one case from this Court which Appellee cites, is opposed to his contention. In the *Furness, Withy* case this Court held that the *res ipsa loquitur* doctrine may be applied only when the plaintiff has demonstrated that: (1) the accident probably would not have occurred in the absence of negligence;

(2) the instrumentality causing the injury was, at the time of the accident, under the exclusive control of the defendant; and (3) plaintiff's conduct does not impair the inference of negligence in any way. See also 2 Harper & James: *Torts*, Sec. 19.5, at p. 1081 (1956). If any of these requirements is not met no liability attaches to a ship-owner under the *res ipsa loquitur* doctrine.

Admitting, arguendo, that the accident involved in this case "probably would not have occurred in the absence of negligence," the facts do not establish the second and third elements necessary to invoke the doctrine. There is no basis for the application of the doctrine when the thing that caused the injury is under the control and management of the injured party. In *Asprodities v. Standard Fruit and Steamship Co.*, 108 F.2d 728, 1940 A.M.C. 22 (5th Cir.) the plaintiff brought an action under the Jones Act to recover damages for the death of an engineer who was scalded by steam when a pipe pulled loose from a flange connecting it to one of the boilers. Noting that the engineer was on watch at the time the accident occurred and was charged with the duty of seeing that all steam pipes and other fittings were operating properly, the court held that the doctrine of *res ipsa loquitur* did not apply since the thing that caused the injury was under the control and management of the injured party at the time of the accident.

The plaintiff's own conduct must play no part in the mechanics of the accident so as to complete the basis for an inference that the defendant was in control of all factors which might have caused the accident. This requirement cannot be satisfied where the plaintiff's duties

or actions involved him in the functional performance of the instrumentality causing the injury and where, from the facts, it is impossible to exclude the possibility that the accident was due to plaintiff's own negligence. *Seville v. United States*, 163 F.2d 296, 298, 1948 A.M.C. 371, 372 (9th Cir. 1947) ("the accident as well may have been caused by the failure to avoid it as by the negligence of the injured man's fellow workmen"); *Petition of McAllister*, 53 F.2d 495, 501, 1931 A.M.C. 2003, 2004 (S.D. N.Y.); *Asprodites v. Standard Fruit and Steamship Co.*, *supra*. See also 1 A.L.R. 3rd 648, 649. Even ignoring for the moment the other aspects of Schneider's control and participation here, the unquestioned fact is that he turned on the power which made the compressor dangerous and the injury possible.

The force and effect of the doctrine of *res ipsa loquitur* is set forth in *Geotechnical Corp. of Delaware v. Pure Oil Co.*, 196 F.2d 199, 205, 1952 A.M.C. 727, 735 (5th Cir.), where the court stated:

"[T]he doctrine as expounded by the Supreme Court, and to be applied in admiralty, has less potency than is given it in some other courts. It suffices to cite three recent cases: *Sweeney v. Erving*, 228 U.S. 233; *Jesionowski v. Boston & Maine Railroad*, 329 U.S. 452; *Johnson v. United States*, 333 U.S. 46, the last suit in admiralty. The effect of them is to hold that the doctrine is not a rule of law, but a principle of evidence, useful to aid in making a *prima facie* case, but that it does not change ultimately the burden of proof on the plaintiff to show negligence in the defendant; and when the evidence is all in, the question still is whether all the evidence, in light of common experience, reasonably

shows that the defendant was negligent in some respect that caused the injury, though the particular negligence cannot be pointed out or directly proved.”

III

APPELLEE IS BARRED BY HIS OWN NEGLIGENCE

A. A Finding of Appellee's Own Breach of Duty Is Required by the Court's Other Findings.

Appellee ignores the point of our contention with respect to his negligence. He argues from a portion of the evidence in an effort to show ordinary care on his part, but does not relate his argument to the District Court's finding, in effect, that some unspecified employee(s) of Hudson had been negligent. Appellant's point is quite simply that Schneider cannot dissociate himself from the District Court's finding of negligence since that finding is based on a failure to discover and correct the condition of the pressure regulator and the record shows no one who had a better opportunity to discover this condition than Schneider himself and shows that such inspections of the equipment as were thought necessary, both at the time he undertook to repair it and while he was on watch just previously, were made by him as a part of his duty.

We have already pointed out that it seems less than candid for Schneider to suggest that he might have supposed that the compressor was simply turned off and not broken down. Even apart from his prior inspections of the equipment, in which he did not observe that the box was tilted off its mounting, it is difficult to understand

the contention that he is free of negligence and thus absolved of fault, when he approached a piece of gear known to be defective, found himself protected by the power's having been turned off and then, without inquiry or examination to find out the reason for this, turned it on again and made the gear dangerous.

B. Appellee's Breach of Duty Is of the Type for Which Appellant Has a Cause of Action and It Therefore Bars Appellee's Recovery.

Appellee attempts to dispose of the effect of his negligence by placing a very misleading label upon the rule, represented by *Walker v. Lykes Bros. Steamship Co.*, 193 F.2d 772, 1952 A.M.C. 269 (2d Cir.), that the failure of an officer to perform the work for which he is hired is not mere contributory negligence which diminishes recovery but a breach of his contract which bars recovery entirely by a complete offset of damages. The meaning of the "primary duty" label is far from clear. The term seems to have appeared in certain cases involving breach of a company rule as a contributing factor to injury, while other such cases were dealt with formerly as cases of assumption of risk. This confusion was carried over and compounded in one of the cases which Appellee cites in which the *Walker* case was discussed.⁴

Appellee advances a number of cases in which the *Walker* rule was not applied. In two of these cases the rule was rejected.⁵ In four cases the rule was not found

⁴*Boat Dagny, Inc. v. Todd*, 224 F.2d 208, 1955 A.M.C. 2083 (1st Cir.).

⁵*Boat Dagny, Inc. v. Todd*, *supra*; *Duabar v. Henry DuBois' Sons Co., Inc.*, 275 F.2d 304, 1960 A.M.C. 1393 (2d Cir.).

applicable to the particular facts.⁶ And in one case the rule was not mentioned and had no possible application.⁷

It is not surprising that Appellee should find comforting words in some of these cases, such as the *Dunbar* case, since it appears that in none of them, apart from *Dixon v. United States*, 219 F.2d 10, 1955 A.M.C. 498 (2d Cir.), did the courts understand the basis of the *Walker* rule.⁸ Only in the *Dixon* case, where the rule was not applicable to the facts because Dixon had not breached any duty to his employer, did the Court (speaking through Judge Harlan) disclose an understanding of the rule. The Court said in that case:

“Cases such as *Walker v. Lykes Bros. S.S. Co.*, 1952 A.M.C. 269, 193 F.(2d) 772 (2 Cir.); *Great Northern Railway Company v. Wiles*, 240 U.S. 444 (1916), and other cases of the same tenor which the appellant cites, are in no way inconsistent with the rule that assumption of risk is not a defense or comparable to the situation before us. Those cases are only instances of the firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee

⁶*Dixon v. United States*, 219 F.2d 10, 1955 A.M.C. 498 (2d Cir.); *Mason v. Lynch Bros. Co.*, 228 F.2d 709, 1956 A.M.C. 394 (4th Cir.); *Chesapeake & Ohio RR. v. Newman*, 243 F.2d 804, 1957 A.M.C. 2369 (6th Cir.); *Spero v. The Argodon*, 150 F.Supp. 1, 1957 A.M.C. 1056 (E.D.Va.).

⁷In *Ktistakis v. United Cross Navigation Corp.*, 316 F.2d 869, 1963 A.M.C. 1211 (2d Cir.) the judgment was quite properly reversed because an officer had been charged with 50% contributory negligence on the basis that a defective condition was within an area of the vessel for which he had a general responsibility but without the slightest showing that he had neglected his responsibility.

⁸The point was likewise not grasped in the law review notes cited by Appellee.

relationship. Their result turns really not upon any question of 'proximate cause,' 'assumption of risk' or 'contributory negligence,' but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work. Such cases are quite inapposite here. Dixon was not guilty of any breach of duty to his employer."

Here again Appellee attempts to equate an uncongenial rule with assumption of risk in order to eliminate the rule as it pertains to the Jones Act (negligence) aspect of the claim.⁹ How it can be supposed that the elements of assumption of risk are identical with the elements of the breach of an employment contract is difficult to understand. It is equally difficult to understand how an Act depriving an employer of a defense to tort suits can be read as depriving him of the right to bring actions for breach of contract. The right to sue an employee, maritime or otherwise, for a breach of contract causing damages seems to be recognized as unimpaired to the present day. To deprive the employer of this right would reduce the employment contract to no contract at all—an arrangement in which an employer would be under an enforceable duty to pay wages but the employee under no enforceable duty whatever. Although it does not seem to have been grasped by a number of courts (and probably the counsel who appeared before them) the true

⁹As Appellee's contentions are based upon interpretations of the Federal Employers Liability Act, 45 U.S.C. §51 et seq., as incorporated in the Jones Act, they have no application to the claim based upon the warranty of seaworthiness.

significance of the *Walker* rule is, as Judge Harlan points out, that it avoids circuitry of action by accomplishing an offset of damages without the necessity of separate claims.

Viewing this matter in perspective there seems to be no question but that Schneider, or anyone in his position, can be held accountable to his employer for the damages which his breach of duty causes with respect to the injury of a fellow employee. If another employee had been injured concurrently with Schneider and recovered damages from Hudson Waterways, Hudson in turn could recover the same damages from Schneider. It is difficult to rationalize a proposal under which the shipowner would have to pay Schneider, as well, and would be barred from recovering that portion of its damages which represented payment to Schneider himself rather than to his co-employee.

CONCLUSION

For the reasons set forth in our Opening Brief and above we submit that the Decree should be reversed with directions to enter a decree for Appellant.

Dated, San Francisco, California,
March 10, 1966.

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